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*Submitted by*
MORRIS POTTISH

# Supreme Court of the United States

**October Term 1963**

**No. 391**

ALEX HOLLANDER,

*Petitioner,*

*against*

GEORGE HOLLANDER,

*Respondent.*

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The petition herein indicates (p. 2) that petitioner is submitting copies of his Appendix to the Court of Appeals. In the succeeding portions of this brief, a numeral followed by "a" refers to page number of said Appendix.

### Facts

Petitioner's statement of facts is both inaccurate and inadequate but we believe it unnecessary to burden the Court at this time with a full exposition of such inaccuracies and inadequacies. We limit ourselves to an accurate statement of those facts which are directly pertinent to the question petitioner now presents.

After trial of an action for an accounting, District Judge Dimock held, "I find the defenses raised to be without merit" (9a); and by his judgment entered November 3, 1961 he directed the petitioner to account to the respondent (12a-13a).

Petitioner's original account was received January 15, 1962; respondent moved before District Judge Dawson

to punish for contempt for non-compliance with the judgment; and Judge Dawson, deciding to give petitioner another chance, denied the motion without prejudice on February 2, 1962, with a provision that "Any further failure of defendant to comply precisely with this order may be punished by contempt" (28a-29a).

Petitioner's first amended account was received on March 7, 1962. Respondent then moved before District Judge Bonsal for an order:

> 1. punishing petitioner for contempt for non-compliance with the prior directions of the court,
>
> 2. directing petitioner to serve a new account in compliance with the earlier directions of the court, and
>
> 3. granting such other relief as might be proper (70a).

On this motion Judge Bonsal made a memorandum decision on April 23, 1962 wherein he found, among other things:

> "Upon a thorough review of all the papers in this action, I find that the defendant has still not complied with Judge Dimock's order of November 3, 1961. For example, the account contains no adequate statement as to the amounts of capital contributed by the joint venturers. * * * Moreover, the item 'Payments to Plaintiff' ($3,683.82) is not broken down either by dates or specific amounts. There are doubtless many other deficiencies." (40a)

Based on said decision, and on April 30, 1962, Judge Bonsal ordered a reference to a Special Master to hear and report, and ordered that

> "the Special Master shall hear testimony, receive reports, check vouchers, and receive any other information which may be relevant to the making of a

> proper accounting by the defendant Alex Hollander in accordance with the instructions contained in or order herein made by Judge Edward J. Dimock dated and entered November 3, 1961." (43a)

In the same order, Judge Bonsal further directed (and this is the sole basis for the instant petition for a writ) that

> "all costs of the proceeding before the Special Master shall be paid by the defendant Alex Hollander, and that the amount of such costs shall be fixed by the Court." (43a)

Expensive hearings were had, with evidence offered by counsel for each party; and the Special Master in his report included recommendations for the preparation of a second amended account (63a-64a). Thereafter, by order made November 19, 1962, Judge Bonsal directed that petitioner file a second amended account in accordance with those recommendations (68a-69a). By said order, Judge Bonsal also adjudged petitioner in contempt and fined him the costs of the proceeding in amounts totalling $4,379, consisting of $1,000 to respondent's attorney as reasonable compensation for his services, plus $379 for his disbursements, plus $3,000 to the Special Master as reasonable compensation for his services (72a).

## Appeal Proceedings Below

Petitioner appealed to the Court of Appeals. Respondent moved to dismiss the appeal (pet., p. 14). That motion was grounded on the proposition that the contempt order appealed from was not a "final" decision within the meaning of 18 U. S. Code, Section 1291, and hence there was no jurisdiction to entertain the appeal. In support of that contention, respondent cited *Fox v. Capital Co.*, 299 U. S. 105; *Doyle v. London Guarantee & A. Co.*, 204 U. S. 599; and *Hultberg v. Anderson*, 214 F. 349. The motion to dismiss was denied (pet., p. 14).

The appeal was then heard on the merits, and the Court of Appeals unanimously affirmed on June 17, 1963 (pet., pp. 13-14).

Petitioner then petitioned for rehearing, which the Court of Appeals unanimously denied on July 2, 1963 (pet., p. 15).

## ARGUMENT

### POINT I

**Judge Bonsal's direction that petitioner pay costs did not constitute a denial of due process.**

Petitioner claims (pet., pp. 3-4) that Judge Bonsal's direction that petitioner pay the costs of the proceeding before the Special Master constituted a deprivation of due process under the Fifth Amendment. Petitioner cites no authority for his position.

Petitioner makes no claim that he was deprived of notice or opportunity to be heard; and of course he participated fully in all the hearings and proceedings below. He argued in the Court of Appeals (see, pet., p. 18) that Judge Bonsal's direction constituted a "prejudicial pre-judgment." That argument was based on the premise that Judge Bonsal could not allocate costs until after he received the evidence to be developed at the hearing before the Special Master. We submit that such premise is invalid.

The respondent had moved for several forms of relief, including not only an adjudication of contempt, but also a direction to petitioner that he comply with the prior directions of the court (70a). On the basis of the motion papers submitted to Judge Bonsal (before any reference was had), he found that the petitioner had not complied with the prior directions of the court (40a), and directed that the Special Master hear and report as to information relevant

to the making of a proper accounting (43a). The Special Master subsequently made such recommendations (63a-64a), and Judge Bonsal then directed petitioner to file a second amended account in accordance with those recommendations (68a-69a).

We thus have a situation where the reference was made necessary because the petitioner had failed to comply with the prior judgment and order of the District Court. Who should pay the costs of such a reference if not the petitioner whose non-compliance had made it necessary?

It was not essential for Judge Bonsal to have the results of the Special Master's hearing in order to determine whether petitioner was or was not in compliance; the fact of non-compliance was evident from the papers, and Judge Bonsal explicitly so found (40a). This was not a "pre-judgment"; it was an actual and proper finding that the petitioner was not in compliance; and by the same token it was an actual and proper finding that the petitioner was unsuccessful in his contention that he was in compliance. Thus, not only was the petitioner the unsuccessful party (*cf.* Rule 54(d) of the Federal Rules of Civil Procedure), but the finding of non-compliance in this equity proceeding vested the Court with jurisdiction in its discretion to impose and allocate costs against the erring petitioner (*Kansas City Southern Ry. Co. v. Guardian Trust Co.*, 281 U. S. 9; *N.L.R.B. v. Brashear Freight Lines*, 127 F. 2d 198, 200; *Atwood v. Klebera*, 163 F. 2d 108, cer. den. 332 U. S. 843). As for the actual amount of costs awarded, this was not determined by Judge Bonsal until after he had the benefit of the Special Master's hearing and report (70a-73a).

Petitioner argues:

> "It certainly offends notions of fair play and due process to impose, *as a condition for affording an accused a hearing*, that he pay the costs of such a hearing." (Pet., p. 10; emphasis added.)

The difficulty with that argument is that it is contrary to the fact. Petitioner's opportunity to defend himself was not conditioned upon his payment of the costs. The question of amount of costs payable was explicitly reserved until after the hearing (43a); and indeed the petitioner has not paid any of the costs to respondent to this very date.

Petitioner further argues (pet., p. 10) that the advance direction for costs would so unconsciously impair the objectivity of the Special Master because a report of acquittal would be embarrassing to Judge Bonsal, and further that Judge Bonsal would be embarrassed if he acquitted the petitioner of contempt. We submit that said argument is absurd on its face, that it is offensive without warrant, and that it need not be dignified by further formal response.

## POINT II.

### Reasonable damages should be adjudged to respondent for the delay caused by petitioner.

The judgment directing petitioner to account to respondent was granted on November 3, 1961. The order giving petitioner a second chance to comply with the judgment was made on February 2, 1962. The finding that petitioner had again failed to comply was made on April 23, 1962. Extensive hearings had to be held; and then the order directing petitioner to file a new account was made on April 30, 1962, which order also adjudged petitioner in contempt. Petitioner appealed, and there was a unanimous affirmance on June 17, 1963. Petitioner then petitioned for a rehearing, which was unanimously denied on July 2, 1963. Now, almost two years after the judgment for an accounting, we have the instant petition for a writ which makes the entirely unwarranted charge of "tainting of the judicial process" (pet., p. 11) and in truth shows no ground

whatever for a writ (cf., Rule 19(1) of the Rules of the Supreme Court).

The mere chronological statement of the proceedings shows that petitioner's proceedings have caused considerable delay, to say nothing of harassment and expense, to the respondent. We submit that this is an appropriate case for this Court to "adjudge to the respondent reasonable damages for his delay", pursuant to Rule 56(4) of the Rules of the Supreme Court.

## CONCLUSION

**The petition for a writ of certiorari should be denied. Reasonable damages should be adjudged to respondent for his delay.**

Dated: August 26, 1963.

Respectfully submitted,

MORRIS POTTISH,
*Attorney for Respondent.*